Supreme Court, U.S.
F I L E D
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CLERK

No. 96-794

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1996

JANE ROE,

Petitioner,

v.

A. JOSEPH MASKELL, et. al.

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Jane Roe brought suit in the Circuit Court for Baltimore City against the Archdiocese of Baltimore, Archbishop William Keeler, Seton Keough High School, School Sisters of Notre Dame, A. Joseph Maskell and Christian Richter, M.D., alleging that the various defendants sexually, physically and/or psychologically abused her - or were responsible for sexual, physical and/or psychological abuse committed upon her - during her years in high school, which ended with her graduation in 1972.[1] Father A. Joseph Maskell was the chaplin at Seton Keough High School, and Ms. Roe was allegedly referred to him for counseling during her high school years. During those periods of counseling she alleged that she was subjected to repeated sexual, physical, and psychological abuse.

After engaging in a period of discovery, the Respondents here moved for summary judgment in the Circuit Court for Baltimore City, based upon the Maryland statute of limitations, which provided that a civil action at law "shall" be filed within three years from the date it accrues. The alleged acts of abuse ended in 1972, and the lawsuit was not initiated by Ms. Roe until 1994. In opposition to the motion for summary judgment she argued that the "discovery rule", which provides an exception to the three year period in the Maryland statute of limitations should

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[1] As the matter was addressed on summary judgment in the state courts, the record was viewed in the light most favorable to Ms. Roe.

have applied to toll her filing requirement, as based upon the concept of "repressed memory" she did not begin to recall the abuse to which she was subjected until 1992. She argued that as she had commenced her action within three years of her recall of the events in question, that the statute of limitations should have been tolled, allowing her suit to proceed. Alternatively, she argued that the provision of the Maryland Code which allows for extensions of time within which to bring actions for persons under a disability should have applied because her mental state rendered her, in effect, disabled within the meaning of that code provision, likewise extending the statute of limitations.

Although Ms. Roe professed that she was unable to recall certain sexual, physical and psychological abuse, she was clearly able to recall from the period 1968 through 1992 various incidents, as described in the petition, which were allegedly undertaken against her will by Father Maskell. She indicated, however, she was unable to recall other "more serious acts of abuse."

Nevertheless, the Maryland Court of Appeals found that the statute of limitations, contained in §5-201 of the Courts and Judicial Proceedings Article of the Maryland Code, barred her cause of action. That three year statute of limitations, the court found, was applicable, and was not extended by the "discovery rule." In Maryland, the "discovery rule" operates as a judicially created tolling provision with regard to §5-101. As discussed by the Court of Appeals in its opinion, contained as an appendix to the petition at pages 4a through 7a, the discovery rule historically

was applied first in medical malpractice actions, and was then extended to encompass other forms of professional malpractice, until being ultimately extended to all civil actions in 1981. The "discovery rule" operates to hold that a cause of action "accrues" pursuant to §5-101 when a plaintiff knows or should have known that actual harm had been done to him or her. After reviewing all of the evidence presented, the Maryland court found that the discovery rule should not operate where a plaintiff claims repressed memory, finding that the concept of repression is indistinguishable from forgetting, which would not activate the discovery rule.

Similarly, the Court of Appeals considered the alternative theory of disability under §5-201 of the Courts and Judicial Proceedings Article of the Maryland Code, and found that the statute had been interpreted only to apply in instances where persons were insane. Citing to numerous Maryland cases, the Court of Appeals found that the evidence of record indicated that Ms. Roe was competent during the period of time in which the abuse allegedly occurred and continued to be competent until she filed her action in 1994. The Maryland court found that there was no "contrary evidence in the record" indicting that Ms. Roe was unable to manage her affairs or could be in any way held to be insane.

The Petitioner here seeks review, pursuant to 28 U.S.C. §1257(a) alleging that this Court should review a federal constitutional question with regard to the application of the discovery rule to the Maryland statute of limitations, under circumstances where repressed memory is alleged. However,

Petitioner admits at page four of her petition that she "...did not reference the Fourteenth Amendment by name..." before the Maryland Court of Appeals, or for that matter before any Maryland court. She avers however that her argument was "...couched in terms of due process..." indicating that various comments she made with regard to being allowed to have her day in court should be construed by this Court as having raised a federal constitutional question before the Maryland courts. The record indicates, however, that no federal question was raised, and in fact no federal question was discussed by either the circuit court judge for Baltimore City, nor by the judges of the Maryland Court of Appeals.

SUMMARY OF ARGUMENT

The petition should be denied because the Petitioner presented no federal question to the Maryland courts, either at the trial or appellate level. No Maryland court considered a federal question, nor ruled upon a federal question.

As well, the petition should be denied because there is no conflict among the circuits with regard to the question which the Petitioner seeks to raise before this Court. The Petitioner has not demonstrated any conflict between the various federal circuits concerning the application of the Fourteenth Amendment of the United States Constitution to repressed memory/statute of limitations cases arising under state court practice. She has demonstrated at most that there are decisions by federal courts which vary, due to the fact that the state laws upon which

they are based vary. She has demonstrated no "conflict" among the circuits.

Finally, the petition should be denied because the petitioner has demonstrated no violation of the due process clause of the Fourteenth Amendment of the United States Constitution with regard to the ruling of the Maryland Court of Appeals. All that she has demonstrated is that the Maryland Court of Appeals applied its three year statute of limitation to the facts and circumstances of her case and ruled that her action was time barred. She has not demonstrated any violation of due process in the ruling of the Maryland court.

REASONS FOR DENYING THE WRIT

THE PETITION FOR A WRIT OF CERTIORARI OF JANE ROE SHOULD NOT BE GRANTED BECAUSE (1) IT SEEKS TO RAISE A "FEDERAL QUESTION" THAT SHE DID NOT RAISE BEFORE THE MARYLAND COURT OF APPEALS; (2) IT DOES NOT DEMONSTRATE A CONFLICT OF LAW AMONG THE FEDERAL CIRCUITS; AND (3) IT FAILS TO SHOW ANY VIOLATION OF THE FOURTEENTH AMENDMENT, AS THE QUESTION INVOLVES, AT MOST, AN INDIVIDUAL QUESTION OF STATE LAW, OVER WHICH THIS COURT DOES NOT HAVE JURISDICTION.

A. Introduction

Jane Roe seeks review on certiorari of the decision of the Maryland Court of Appeals, which ruled that repressed memory did not meet the State of Maryland's requirements with regard to the application of its discovery rule, to extend its statute of limitations. This was purely a matter of interpretation of state law which was addressed as such by the parties before the trial court and before the Court of Appeals of Maryland, the state's highest appellate court. At no time during the process did Ms. Roe raise a federal question with regard to the application of the Fourteenth Amendment of the Constitution of the United States to her claim, nor did she seek a ruling by any Maryland court on that issue. By failing to raise a federal question before the state courts so that they might have an opportunity to rule thereon, she has failed to preserve that issue for review here.

Further, even if she had preserved the issue for review by this Court, Ms. Roe seeks to challenge a state statute of limitations based on an alleged violation of federal due process under the Fourteenth Amendment. That said, she has set forth nothing in her petition to show that there was a violation of the due process clause of the Fourteenth Amendment by the decision of the Maryland Court of Appeals, in its holding that the doctrine of repressed memory did not provide a basis for the application of the discovery rule in tolling the state statute of limitations.

As well, although Ms. Roe in her petition argues that there is a split among the federal circuits

with regard to the application of the treatment of repressed memory as an exception to various state statutes of limitation, there is clearly no split in the circuits necessary to support review by this Court. There is no conflict of federal law as between those United States district courts and circuit courts which have addressed the issue. Instead, each federal court has applied the state law to the substantive issues before it in making its ruling. There is no "conflict" of the interpretation of federal law, but there is, instead, merely a difference in the decisions rendered by the various federal courts, given the application of different state law in each case.

B. **Petitioner Jane Roe Failed To Raise Before The State Courts Any Challenge Based Upon The Application Of The Due Process Clause Of The Fourteenth Amendment, And As Such, This Court Should Not Review The Issue On Certiorari.**

Jane Roe petitions this Court for review pursuant to 28 U.S.C. §1257(a) which indicates that this Court may review on certiorari a final judgment rendered by the highest court of a state where the validity of a state statute is drawn into question on the grounds that it is repugnant to the Federal Constitution. It is clear from a review of her petition that Ms. Roe did not raise this issue before either the state trial court or the Maryland Court of Appeals. In fact she admits at page four of her petition for certiorari that she "... did not reference the Fourteenth Amendment by name...". She nevertheless maintains that her argument was

"...couched in terms of due process..." in an attempt to persuade this Court that what was clearly a question of the application of state law, to the individual facts of her case, can nevertheless be brought before this Court as a "federal question" concerning the application of the United States Constitution to her claims. A review of the decision of the trial court, and of the Court of Appeals decision, demonstrates clearly that neither of those courts addressed any federal question or the application of federal constitutional law, as it was in fact not raised. The United States Constitution is never mentioned in the briefs which were filed before the Court of Appeals in Maryland, and in fact, no federal question was raised.

This Court has held generally that to be reviewable on certiorari, pursuant to the above referenced statute, a federal question must be raised in and decided by the state court. In Illinois v. Gates, 462 U.S. 213 (1982) this Court explained the traditional approach to a review on certiorari of a federal question arising from a state court proceeding. This Court indicated as follows:

> But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below... In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in

> the highest court of the state whose judicial action we are called upon to review.

Id. at 462 U.S. 218 (citing McGoldrick v. Compagnie Generale Trans Atlantique, 309 U.S. 430, 434-435 (1940)).

Historically, this Court referred to whether a matter had been "pressed or passed" in a state court as a matter of jurisdiction, indicting that unless a federal question had been raised and decided in a state court, the Supreme Court of the United States had no jurisdiction to review the matter on certiorari. See, Crowl v. Randell, 10 Pet. 368, 392, 9 L. Ed. 458 (1836). This Court in Illinois v. Gates, however, noted that in more recent decisions the Court had treated the matter as an exercise of the Court's discretion as opposed to the historical view that the rule was a matter of jurisdiction. While the jurisdictional character of the matter has been changed, it is clear that this Court still disfavors the review on certiorari of matters which have not been pressed or passed upon by the state courts.

In Illinois v. Gates, this Court indicated that there are a number of reasons why review is disfavored. Initially, questions that have not been raised before the state court generally result in a record which is inadequate since it was not compiled with those federal questions in mind. 462 U.S. at 221. See, Cardinale v. Louisiana, 394 U.S. 437, 439 (1969). Secondly, this Court has indicated that it does not wish to infringe upon its relationship with the courts of the various states, noting that said relationship "demands" that the state court be given an

opportunity to consider the constitutionality of state matters and to likewise be given the opportunity to fashion remedies in any constitutional situation. 462 U.S. at 221-222. Finally, this Court notes that the presentation of a federal question for review by a state court allows it to make decisions on state law grounds before a federal question is reached. 462 U.S. at 222. The very nature of the reasons articulated by this Court for not exercising its discretion to review matters not passed upon by the lower courts, impact most clearly with regard to decisions of state courts, resulting in this Court's greater reticence to review federal questions that have not been raised in state courts as juxtaposed to federal questions not raised in federal courts.

The Respondents have been unable to identify, subsequent to the decision of this Court in Illinois v. Gates, any case in which this Court has accepted certiorari, from a state court, when a constitutional issue was not initially raised by the petitioner before the state court, nor passed upon by the state court. Petitioner has cited none. It is clear that Ms. Roe did not raise a federal constitutional issue before the Maryland courts, and it is also clear that no ruling was made by the Maryland Court of Appeals with regard to any federal constitutional issue. Instead the matter was raised as an issue of state law interpretation, and was so considered and ruled upon by Maryland's highest court. Under those circumstances, certiorari should be denied.[2]

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[2] This Court recently denied review of a due process claim, brought in the context of the application of repressed memory to a state statute of limitations in Pritzlaff v. Archdiocese of

C. **Even Assuming That The Petition Filed By Jane Roe Raises A Federal Question, Which Was Properly Raised Below And Is Therefore Reviewable By This Court, There Is No Conflict Among The Circuits Warranting Review.**

Jane Roe seeks to have this Court grant certiorari and review her position that the Maryland Court of Appeals, by refusing to accept repressed memory as a reason to toll the statute of limitations in Maryland, presents one side of a split in the federal circuits on the issue of repressed memory, thereby warranting review by this Court. However, there is no split in the federal circuits concerning a federal question, and therefore there is no basis for review by this Court.

Each of the cases cited in the petition at pages ten through fourteen deal with individual state statutes of limitations applicable in each jurisdiction and how those state statutes of limitations and any judicially created "discovery rule" would be applied under the facts and circumstances of each case. Each court sought to interpret state law. For example, in Roe v. Doe, 28 F.3d 404 (4th Cir. 1994), a case cited in the Petition Brief, the court was asked to interpret the law of South Carolina. It did so, finding that the plaintiff, under the facts and circumstances of that case, did not act within a sufficient time to avoid the

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Milwaukee, 533 N.W.2d 780 (Wis. 1995) cert. denied, __ U.S. ___, 116 S. Ct. 920 (1996). Respondents there, as here, argued that the issue had not been "pressed and passed" in the state courts.

operation of the statute of limitations which barred her claim. In that case, and in the various United States Circuit and District Court cases cited in the petition, it is clear that each federal court was applying a particular state statute, and the judicially created "discovery rule" to the facts and circumstances of a particular case.

This is not an example of a split in the circuits warranting review by certiorari. This Court has indicated that a conflict among the circuits involving questions controlled by state law is not a reason for granting writs of certiorari. As this Court noted in Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938) such a conflict may be merely corollary to a permissible difference of opinion in the state courts, and is not an example of a conflict which must be resolved between the circuits. While certiorari will often be granted where there is a conflict among the circuits concerning a matter of federal law, such is not the case with regard to federal courts interpreting state law. Moreover, even when there is a conflict among the various circuits concerning a question of federal law, there is no requirement that certiorari be granted. See McElroy v. United States, 455 U.S. 642, 643 (1982); Marks v. United States, 430 U.S. 188, 189 (1977).

The alleged conflict among the circuits here is nothing more than circuit courts deciding questions of state law, under particular state statutes of limitation. That the various circuit courts have reached differing conclusions with regard to the applications of various state statutes under differing factual circumstances provides no basis for a grant of

certiorari here. There is no conflict among the circuits. There is merely a difference between the circuits based on differences in state law and state statute.

D. **Assuming, Arguendo, That The Petitioner Has Suggested In The Petition A Federal Question Which Meets The Requirements For Certiorari Pursuant To Federal Statute, There Is No Violation Of The Due Process Clause Meriting Review By This Court.**

Jane Roe's basic argument seems to be that there has been a violation of due process, as she has been denied access to the courts of Maryland based upon the application of a Maryland statute of limitations. She suggests that she has been denied the right to assert her claim through no fault of her own, due to her repressed memory claim.

Petitioner's request for certiorari does not, however, demonstrate a denial of due process. This Court has consistently found that statutes of limitations serve a legitimate purpose, and that they constitute an important element of the judicial process. See, e.g. Crown, Cork & Seal Co., Inc. v. Parker, 462 U.S. 345 (1983). In Board of Regents of University of New York v. Tomanio, 446 U.S. 478 (1980), this Court indicated that statutes of limitations are more than technicalities and are necessary to a well ordered judicial system.

In Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945), this Court was asked to construe a

Minnesota statute of limitations provision which appeared to prohibit a suit for fraud. Subsequent to commencement of the suit, the legislature had passed a law indicating that the existing limitation would not apply to cases such as that before the court. Nevertheless, this Court ruled that this did not violate the petitioner's due process rights. Furthermore, the Court, in its opinion by Justice Jackson, stated that statutes of limitation were necessary, and that their justification rested in convenience rather than in logic. Justice Jackson noted that while statutes are by definition arbitrary, their operation would not discriminate between just and unjust claims. Clearly statutes of limitations go to matters of remedy and not to destruction of fundamental rights. Id., 325 U.S. at 313-314.

Respondents have been unable to identify any cases decided by this Court in which a statute of limitations was overturned on due process grounds, under circumstances such as are presented in the petition. While this Court has held that a cause of action is akin to a property right protected by the Fourteenth Amendment due process clause, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the circumstances here are unlike those in Logan. There a statutory period of 120 days existed within which the Illinois Fair Employment Practices Commission was required to hear a claim. The Commission set a hearing date after that period had expired and then dismissed the claim. This Court agreed with the appellant that the right to due process had been violated as a result of an occurrence beyond his control - the setting of the hearing date outside the

time limit required by statute - and indicated that the appellant was entitled to a hearing on the merits.

Here the situation is not the same. The Maryland Court of Appeals did not, as did the Illinois Fair Employment Practices Commission, violate its own statutory period of limitations. The Maryland three year statute of limitations contained in §5-101 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code was not violated by any action of a Maryland court. Further, the refusal of the court to apply the disability provisions of §5-201 of the Maryland Annotated Code, Courts and Judicial Proceedings Article, was likewise not a violation of that provision. Instead, as is demonstrated by the Maryland Court of Appeals in its opinion, its refusal to apply §5-201 was in accordance with Maryland jurisprudence and case precedent interpreting that section, which limited its application to those who were demonstrated to be insane. Neither the Petitioner here, nor the Co-Plaintiff below, demonstrated that they were insane and thereby not able to file their cause of action.

The failure of the Maryland Court of Appeals to apply the discovery rule under the facts and circumstances presented to it in Ms. Roe's case cannot be a due process violation. The Maryland Court of Appeals concluded that repressed memory was akin to forgetting, and did not constitute a basis upon which the discovery rule should apply to extend the three year statute of limitations period contained in §5-101 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code. In interpreting its own statute and in applying its own discovery rule to

that statute, the court did not violate Ms. Roe's due process rights under the Fourteenth Amendment. The statute of limitations and its discovery rule allowed Ms. Roe the right to bring her cause of action, but the Maryland court found that she did not bring it in a timely way. Her fundamental right of access to the courts was not destroyed, but instead the Maryland Court of Appeals merely applied its own statute and judicial precedent to the facts and circumstances of her case, which resulted in a dismissal based upon the application of the statute. This is purely a question of state law and is not a due process violation warranting review by this Court.

CONCLUSION

For these reasons, the Petition for Certiorari should be denied.

December 20, 1996

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